**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

ID#3646

**ENERGY DIVISION** **RESOLUTION E-3875**

**July 8, 2004**

# R E S O L U T I O N

Resolution E-3875. Pacific Gas & Electric (PG&E), Southern California Edison (SCE) and San Diego Gas & Electric (SDG&E) request approval of Agency Agreements with the California Department of Water Resources (DWR) for the implementation of the California Consumer Power and Conservation Financing Authority (CPA) Demand Reserves Partnership (DRP) Program.

By Advice Letters (ALs) 2505-E (PG&E), 1720-E-A (SCE), and 1512-E-A (SDG&E) filed on May 10, 2004.

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## SUMMARY

**The submitted Agency Agreements from PG&E, SCE and SDG&E are denied.**
The proposed agency agreements submitted by the utilities via their advice letter filings of May 10, 2004 are denied.

**Denies Utilities' Proposed DWR Revenue Requirement Increase Trigger**
This resolution resolves a major issue between DWR and the utilities by rejecting the utilities' position.

**Provides Additional Guidance to Utilities on Utility Liability, Term of Agreement and Four-Hour Limitation**
These issues required Commission guidance or clarification.

## BACKGROUND

**The Demand Reserves Partnership Has Been a Demand Response Resource since 2002.**
The Demand Reserves Partnership (DRP) was created in 2002. The foundation of the program is a five-year contract between the California Consumer Power and Conservation Financing Authority (CPA) and the California Department of Water Resources (DWR). The contract functions much like the other power

supply contracts signed by DWR on behalf of the utilities by providing power, where and when needed, but through reductions in demand, rather than generation.

There are various supporting contracts, called "Demand Reserves Provider Agreements", which underlie the contract between DWR and the CPA. These contracts, between the CPA and several third-party aggregators, specify the terms and conditions of how aggregators provide power to DWR. The terms of the supporting contracts mirror the terms of the contract between DWR and CPA. The Demand Reserve Providers, in turn, have individual agreements with electricity customers who provide the actual demand reduction.

As currently operated, the contracts provide that, when notified by DWR, customers who were consuming power in the normal course of business, curtail their load and make power available for the customers of the utilities. An electronic notification is sent from DWR, to the CPA (and its contractor Automated Power Exchange (APX)), to the aggregators and finally to the customers. In exchange for the reduction in load, participants are paid a monthly capacity payment (based on the amount of load committed for reduction) along with an energy payment (actual amount of energy reduced) when the program is triggered.

The contract between DWR and CPA allow DWR to trigger the program during high wholesale market prices or when energy supplies are short. To date, the program has been triggered by DWR only for reliability and testing purposes. The program operates year-round, but is designed to focus on the summer months. In Summer 2002, the program provided 15 megawatts (MW) of capacity; by Summer 2003, the program provided 249 MWs. The contract between DWR and CPA provides for three more summers of operation (2004, 2005 and 2006).

**The Commission Ordered the Utilities to File Implementation Plans for the DRP**

In D.03-06-032, the Commission recognized the DRP as a viable and important program, and directed PG&E, SCE and SDG&E (the utilities) to coordinate their scheduling activities with the CPA to ensure that the DRP resources are actually dispatched when it is cost effective to do so. The utilities were specifically ordered to file implementation plans detailing how they will use the DRP resource effectively.

In compliance with D.03-06-032, the utilities filed advice letters containing their implementation plans on July 7, 2003. In these advice letters the utilities reported that they must have agency agreements with DWR that enables them to schedule and dispatch of DRP resources on behalf of DWR, essentially allowing them to operate as DWR's limited agents. At the time of their July filings, the utilities reported that negotiations with DWR were initiated and that final agency agreements were targeted for mid-July.

However for the remainder of 2003, the utilities and DWR were unsuccessful in developing the agency agreements as the negotiations between them could not resolve their differences on certain issues.

**The Commission provided Guidance to the Utilities and DWR Regarding the Agency Agreements**

On January 26, 2004, an ALJ ruling was issued directing the utilities to file status reports on the impediments to executing the proposed agency agreements. DWR and the CPA were encouraged to file status reports as well. Each utility complied with the ruling, and DWR submitted its status report. Several parties filed comments regarding the status reports.[1]

On April 1, 2004, an Assigned Commissioner's Ruling (ACR) was issued providing guidance on the impediments discussed in the reports and comments. The primary issue addressed in the ruling was absolving the utilities of least-cost dispatch requirements should DWR trigger the program for reliability or testing purposes as part of its statutory responsibility. That ruling also ordered the utilities to resume negotiations with DWR, finalize agency agreements with the department, and submit final agency agreements via supplemental advice letters.

In response to a memorandum from DWR dated April 26, 2004, a second ACR was issued on May 3, 2004, providing additional clarification on the issue of testing the DRP in relation to least-cost dispatch requirements.

[1] DWR, CPA, APX, Celerity Energy, Onsite Energy Corp., Ancillary Services Coalition, DBS Industries, and Excel Energy Technologies, Ltd., filed comments.

**The Utilities and DWR Have Not Finalized their Agency Agreements**
As directed by the ACRs, the utilities filed their proposed agency agreements via advice letter on May 10, 2004. However each utility noted in its filing that it was unable to resolve every issue with DWR, and thus the agency agreements, as proposed in their filings, have not been agreed to by DWR. Each utility argues that in spite of the remaining differences with DWR, the Commission should adopt the agency agreements as proposed in their respective advice letters.

## NOTICE

Notice of AL 2505-E, AL 1720-E and AL 1512-E-A were made by publication in the Commission's Daily Calendar. The utilities state that a copy of their AL was mailed and distributed in accordance with Section III-G of General Order 96-A.

## PROTESTS

DWR submitted a memorandum dated May 10, 2004 providing comments on the major unresolved issue between itself and the utilities. The memorandum also included a draft Agency Agreement that DWR recommends for adoption. In effect, DWR's memorandum is a protest to the utilities' advice letters. On May 11, DWR sent a revised draft of their recommended Agency Agreement, stating that they inadvertently sent an incorrect version on May 10.

The utilities responded to DWR's protest on May 17 and 18, 2004.[2]

DWR submitted a memorandum dated May 20, 2004 in response to both the utilities' advice letters filing and the utilities' May 17 and 18 responses.

## DISCUSSION

**The Revenue Requirement Language Proposed by the Utilities is Unnecessary**
The primary issue between DWR and all three utilities revolves around certain language that the utilities insist be included in Section 9.04 of their agency agreements with DWR. That language would require DWR to pursue an

[2] PG&E and SCE filed their responses on May 17, while SDG&E filed its response on May 18.

increase to its revenue requirement if moneys in its Electric Power Fund are insufficient to pay amounts owing under the agency agreement. The specific language proposed by PG&E is as follows:

> "If moneys on deposit in the Fund are insufficient to pay all amounts payable by DWR under this Agreement, or if DWR has reason to believe such funds may become insufficient to pay all amounts payable by DWR under this Agreement, DWR shall diligently pursue an increase to its revenue requirements as permitted under the Act from the appropriate Governmental Authority as soon as practicable."

According to the utilities, this language is reasonable and is also identical to that found in their respective operating agreements or servicing orders with DWR. PG&E noted that absent the disputed language, if money in the Electric Power Fund were depleted, DWR could refuse to pay amounts owing to PG&E under the agency agreement without breaching the agreement. In their response comments, the utilities proposed a simplified version of the quoted text.

DWR is opposed to the inclusion of the language on the basis that it already has a statutory duty to revise its revenue requirement under specific triggering situations and circumstances described in its Rate Agreement and bond indenture. DWR believes it is inappropriate to create a separate right for the utilities to dictate a revision to DWR's revenue requirement for the DRP, especially when the program represents an extremely small portion of DWR's overall revenue requirement. DWR notes that as a practical matter, it would revise its revenue requirement if it foresaw that there were insufficient funds to cover amounts it must pay under its contracts, but it is not willing to grant separate and independent obligations to every party to a contract it has.

We agree with DWR that it is not necessary to include the language proposed by the utilities in their respective agency agreements for the DRP. The costs of the DRP are indeed a small portion of DWR's overall revenue requirement, and we agree with DWR that most of the costs that DWR is obligated to cover are payments from DWR to the CPA for costs pursuant to the Demand Reserves Partnership Agreement. We are confident that DWR will take whatever appropriate actions available to it to ensure that there are sufficient funds to cover the amounts it owes the utilities under the agency agreements.

**The Term of the Agency Agreement Should End in 2007**

In its May 10 memorandum DWR proposed that the agency agreements with the utilities should extend through May 17, 2007. The utilities claim that their negotiations with DWR to date have been under the assumption that the term of the agreements end on December 31, 2004. Notwithstanding their concern that this issue was just recently raised by DWR, the utilities are generally amenable to a term ending on May 17, 2007 provided that they have the opportunity to modify other provisions in the agency agreements that are affected by the new date. PG&E notes that the modifications are expected to be minor in nature. We will grant the utilities and DWR 15 days from the effective date of this resolution to file final agency agreements, which is ample time to make any other modifications.

The most prudent course of action is make the term of the agreements extend up to May 17, 2007 as proposed by DWR, rather than December 31, 2004. It is our view that there has been too much time expended in negotiating the agreements and based our observations to date, re-starting negotiations on new agreements for 2005 is will be time-consuming and possibly lead to delays in implementing the DRP that year.

**Utility Liability As Agents for DWR is not Unreasonable**

Both SDG&E and SCE report that they have not reached agreement with DWR regarding the issue of liability. DWR seeks to make the utilities liable (with a cap on that liability) on the basis that agents are commonly liable to their principals under commercial agency agreements. PG&E does not oppose liability as DWR's agent, and has agreed to a liability cap of $1 million.

SDG&E appears to accept the principle of liability as DWR's agent, but was unable to reach an agreement with DWR regarding a cap amount for the liability. Specifically, SDG&E proposes that its liability cap be calculated at a rate of $10,000 per MWh of capacity allocated to SDG&E's territory, with a minimum of $50,000 and a maximum of $200,000 over the term of the agency agreement.

SCE reports that it has a more fundamental issue, stating that it should not be required to accept any liability as an agent for DWR since the agency agreement does not approximate a standard commercial agreement and that accepting liability makes SCE liable to two masters (DWR and the CPUC). SCE also notes that DWR insists that SCE verify invoices from DWR's counterparty, which it

may be willing to do if SCE is not required to accept liability in the agency agreement.

While the agency agreement is not a typical commercial agreement, it is a commercial agreement nonetheless and DWR is not unreasonable in requiring liability on the part of the utilities as its agents. Therefore SCE's fundamental position on this issue is rejected. Regarding the cap on liability, we direct SCE to accept a cap on liability equal to that accepted by PG&E: $1 million. SDG&E's cap on liability should be a portion of $1 million based on potential capacity in its territory in comparison to the potential capacity of the other two utilities.

On the related issue of invoice verification, we note that the April 1 ACR effectively dealt with this issue by requiring the utilities to report participant meter data to the CPA in an agreed-upon format and within 10 days after the close of each month. The utilities' timely collection and reporting of data to the CPA should resolve the issue of validating invoices between SCE and DWR.

**The Four-Hour Limitation Applies Only to Testing of the DRP**

PG&E states in its advice letter that the May 3 ACR could be interpreted to mean that the utilities would be protected from least-cost dispatch penalties for only four hours per month for testing and reliability events. PG&E states that it and the other parties have interpreted the ruling to mean that the four-hour limitation applies only to testing.

We confirm that PG&E and the parties have correctly interpreted the ACR.

## COMMENTS

Public Utilities Code section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.

The 30-day comment period for the draft of this resolution was neither waived or reduced. Accordingly, this draft resolution was mailed to parties for comments, and will be placed on the Commission's agenda no earlier than 30 days from today.

## FINDINGS

1. The Demand Reserves Partnership (DRP), created in 2002, is based upon a five-year contract between the California Consumer Power and Conservation Financing Authority (CPA) and the California Department of Water Resources (DWR).

2. The DRP contract functions much like the other power supply contracts signed by DWR on behalf of the utilities by providing power, where and when needed, but through reductions in demand, rather than generation.

3. "Demand Reserves Provider Agreements", which underlie the contract between DWR and the CPA, specify the terms and conditions of how aggregators provide power to DWR.

4. In exchange for the reduction in load, participants in the DRP are paid a monthly capacity payment (based on the amount of load committed for reduction) along with an energy payment (actual amount of energy reduced) when the program is triggered.

5. To date, the DRP has been triggered by DWR only for reliability and testing purposes.

6. In D.03-06-032, the Commission recognized the DRP as a viable and important program, and directed PG&E, SCE and SDG&E to coordinate their scheduling activities with the CPA to ensure that the DRP resources are actually dispatched when it is cost effective to do so.

7. The utilities and DWR have been unsuccessful in developing agency agreements that enable the utilities to operate as DWR's limited agents for the DRP.

8. On April 1 and May 3, 2004, ACRs were issued that provided guidance to the utilities and DWR regarding impediments to the finalization of their agency agreements.

9. As of May 10, 2004, the utilities and DWR have not been able to finalize their agency agreements, and each utility urges the Commission to adopt their

proposed agency agreements as submitted in their filings on May 10. DWR urges adoption of their proposed agency agreement submitted on May 11.

10. DWR protested the utilities' May 10 filings and the utilities' responded to DWR's protest on May 17 and 18, 2004. DWR submitted a memorandum on May 20, 2004 in response to both the utilities' May 10 filings and their protest responses.

11. The revenue requirement language proposed by the utilities for Section 9.04 of their respective agency agreements with DWR is unnecessary.

12. The term of the agency agreements should extend up to May 17, 2007 as proposed by DWR, rather than December 31, 2004.

13. SCE's fundamental position on the issue of liability is rejected.

14. SCE should accept a cap on liability equal to that accepted by PG&E: $1 million.

15. SDG&E's cap on liability should be a portion of $1 million based on potential capacity in its territory in comparison to the potential capacity of the other two utilities.

16. The utilities' timely collection and reporting of data to the CPA should resolve the issue of validating invoices between SCE and DWR.

17. The correct interpretation of the May 3 ACR is that the four-hour limitation applies only to testing.

18. The proposed Agency Agreement as submitted by DWR should be accepted by the utilities in accordance with the findings of this resolution.

19. DWR's protest is granted.

**THEREFORE IT IS ORDERED THAT:**

1. DWR's protest is granted.

2. The agency agreement as proposed by DWR on May 11, 2004 is accepted in accordance with the findings made in this resolution.

3. The utilities shall file supplemental advice letters with finalized agency agreements that comply with the findings of this resolution within 15 days of the effective date of this resolution.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on July 8, 2004; the following Commissioners voting favorably thereon:

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WILLIAM AHERN
Executive Director